UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ARTHUR J. METAYER and ELIZABETH A. METAYER,	)	
Plaintiffs,	)	
v.	)	Civil No. 98-177-P-C
PFL LIFE INSURANCE COMPANY, and UNITED GROUP ASSOCIATION, INC.	)	
Defendants	)	

Recommended Decision on Defendants' Motion to Strike, Plaintiffs' Motion to Strike, and Defendants' Motion for Summary Judgment

Plaintiffs, Arthur and Elizabeth Metayer, bring this action against Defendants, PFL Life Insurance ("PFL") and United Group Life Insurance ("UGA") and assert the following claims: estoppel (Count I); breach of contract (Count II); fraud (Count III); negligent misrepresentation (Count IV); innocent misrepresentation (Count V); violation of the Maine Deceptive Trade Practices Act (Count VI); violation of the Maine Unfair Trade Practices Act (Count VII); violation of the Maine Unfair Claims Practices statute (Count VIII); negligence (Count IX); intentional infliction of emotional distress (Count X); negligent infliction of emotional distress (Count XI); and punitive damages (Count XII).

Defendants and Plaintiffs have filed Motions to Strike and Defendants a

Motion for Summary Judgment. For the reasons given below, the Court recommends that Defendants' Motion to Strike be GRANTED in part and DENIED in part and that Plaintiffs' Motion to Strike be DENIED. Further, the Court recommends that Defendants' Motion for Summary Judgment be GRANTED in part and DENIED in part.

Plaintiffs' Motion to Strike

Plaintiffs have filed a Motion to Strike the following materials submitted by Defendants: the Affidavit of Teresa Cloutier; the Affidavit of John Lambert; the complaint and answer in the matter of Arthur J. Metayer and Elizabeth Metayer v. Maine Medical Center ("MMC"), Docket No. CV97-188, Cumberland County; and the attachment to Defendants' Motion to Strike entitled "Defendants' Objections to the Statements in the Saucier Affidavit".

A. Affidavit of Teresa Cloutier

Defendants submitted the Affidavit of Teresa Cloutier in support of its Motion to Stay this proceeding (Docket No. 30), not in support of its motion for summary judgment. Accordingly, the Court will not consider that affidavit in its Recommended Decision on Defendants' Motion for Summary Judgment.

B. Affidavit of John Lambert

Defendants submitted the Affidavit of John Lambert to support Defendants'

Objections to Plaintiffs' Statement Facts (Docket No. 28). In the affidavit Lambert states that he received the "errata sheet" five business days before the end of discovery even though Plaintiffs' counsel knew Defendants planned to file a summary judgment motion in this matter. Further, Lambert states that he had a conversation with the attorney for MMC in which Lambert told counsel that he "did not think the Metayers owed Maine Medical Center for the outstanding bills because the claims for payments of those bills had to be preserved in a compulsory counterclaim. . . ." Affidavit of John Lambert ¶ 3.

I recommend that the Court DENY Plaintiffs' Motion to Strike the affidavit. Nevertheless, the Court agrees with Plaintiffs that the affidavit is of minimal relevance in the disposition of any issue in this action.

C. Complaint and Answer filed in the State Action

Plaintiffs move to strike the complaint and answer from the Plaintiffs action against MMC in Cumberland County Superior Court. The Court takes judicial notice of those pleadings. *See E.I. DuPont de Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986) (court took judicial notice of complaint filed in state court even though it was not certified). Having taken judicial notice of the pleadings, I recommend that the Court DENY Plaintiffs' motion to strike the complaint and

answer in the state action.[1]

D. Defendants' Objections to Statements in Saucier's Affidavit

Plaintiffs move to strike an exhibit attached to Defendants' Motion to Strike entitled "Objections to Statements in Saucier's Affidavit" because Defendants are merely trying to avoid the seven-page limit to their Reply to the motion for summary judgment. The Court agrees with Defendant that the page limit on their Reply brief is irrelevant to the Motion to Strike. For that reason, I recommend that the Court DENY the motion to strike Defendants' objections.

Defendants' Motion to Strike

Defendants have filed a Motion to Strike some of the materials cited by Plaintiffs in their Statement of Material Facts, namely, all or parts of the following: an errata sheet; Plaintiff Elizabeth Metayer's Answers to Interrogatories; Affidavit of David Saucier; and the Affidavit of Elizabeth Metayer. The Court recommends that Defendants' motion be GRANTED in part and DENIED in part.

A. The Errata Sheet

Plaintiff Elizabeth Metayer submitted to the Court an "errata sheet" dated

[1] As stated in this opinion, the fact that MMC has not filed a counterclaim up to this time has little bearing on the disposition of Defendants' summary judgment motion.

January 20, 1999, that made twenty-three changes to her deposition. Defendants argue that the errata sheet should be stricken because it seeks to change Elizabeth Metayer's deposition testimony so significantly that it "offends Rule 30(e)" of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 30(e) reads:

> **(e) Review by Witness; Changes; Signing.** If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

Defendants argue that the primary goal of discovery and, in particular of depositions, is to gain access to the facts of the case in an unfiltered fashion. *See Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (one purpose of depositions is to freeze the deponent's testimony before it "has been altered by intervening events, other discovery, or the helpful suggestions of lawyers.") Defendants observe that a line of decisions striking errata sheets has recently emerged premised on the principle that "[a] deposition is not a take home exam." *Greenway v. International Paper Co.*, 144 F.R.D. 322, 324 (W.D. La. 1992); *see also Rios v. Welch*, 856 F. Supp. 1499, 1502 (D. Kan. 1994).

Although Defendants' position has some merit, the Court will not strike the

errata sheet. The Court bases its decision on the plain language of Rule 30(e) which reads, "the deponent shall have 30 days. . . to review the transcript or recording and, if there are *changes in form or substance*, to sign a statement reciting such changes and the reasons given by the deponent for making them." Fed. R. Civ. P. 30(e) (italics added). Rule 30(e) clearly empowers a deponent to change the substance of her testimony if she: (i) does so in thirty days, (ii) signs a statement reciting the changes made, and (iii) states her reasons for each of the changes made. No dispute exists that Plaintiff Elizabeth Metayer's errata sheet fulfilled each of these three conditions. Other courts interpreting Rule 30(e) have similarly determined that the Rule permits substantive changes in deposition testimony after the deposition was concluded. *See Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 103 (2nd Cir. 1997) (agreeing with the proposition in *Lutig* that Rule 30(e) places no limitation on the changes a deponent may make to her deposition); *United States v. Piqua Engineering, Inc.*, 152 F.R.D. 565, 566-67 (S.D. Ohio 1993) ("Thus, under the Rule, changed deposition answers of any sort are permissible, even those which are contradictory or unconvincing, as long as the procedural requirements set forth in the Rule are followed."); *Lutig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981) ("The language of [Rule 30(e)] places no limitations on the types of changes that may be made by a witness before signing

his deposition. . . nor does the Rule require a judge to examine the sufficiency, reasonableness, or legitimacy of the reasons for the changes.").

Although the Court will not strike the errata sheet, the answers given at the deposition remain part of the record and may be admitted into evidence at trial. *Podell*, 112 F.3d at 103. This is the consequence a deponent faces when she makes substantive changes to her testimony after the fact:

> The witness who changes his testimony on a material matter between the giving of his deposition and his appearance at trial may be impeached by his former answers, and the cross-examiner and the jury are likely to be keenly interested in the reasons he changed his testimony. There is no apparent reason why the witness who changes his mind between the giving of the deposition and its transcription should stand in any better case.

Lutig, 89 F.R.D. at 642 (quoting Charles A. Wright & Arthur Miller, Federal Practice and Procedure § 2118). In accordance with Rule 30(e), and for the reasons stated above, the Court recommends that Defendants' Motion to Strike the errata sheet be DENIED.

B. Interrogatory Answers of Elizabeth Metayer

Defendants next seek to strike portions of Plaintiff Elizabeth Metayer's Answers to Interrogatories because the answers are not made on personal knowledge as required by Fed. R. Civ. P. 56(e). As Defendants note, the First Circuit has found that "[i]n summary judgment proceedings, answers to

interrogatories are subject to exactly the same infirmities as affidavits." *Garside v. Osco Drug, Inc.* 895 F.3d 46, 49 (1st Cir. 1990) (citing *H.B. Zachary Co. v. O'Brien*, 378 F.2d 423, 425 (10th Cir. 1967)). Therefore, to have any probative force on a motion for summary judgment, the interrogatory answers must be based on Plaintiff Elizabeth Metayer's personal knowledge.

Defendants argue that the answers are inadequate to merit inclusion in the summary judgment record. Defendants point to the jurat at the end of the interrogatory answers where Plaintiff states that the answers are "to the best of her knowledge, information and belief." This District has previously indicated, when ruling on the sufficiency of affidavits, that the jurat cited above is insufficient for the purposes of Rule 56(e). *Clapp v. Northern Cumberland Mem. Hosp.*, 964 F. Supp. 503, 507 (D. Me. 1997). However, in *Clapp*, this Court nonetheless relied on the deficient affidavit for factual statements that were clearly within the plaintiff's knowledge. *Id.* at 507 n.5. Here, the Court will follow the same path.

Upon reviewing the specific answers, the Court is satisfied that many of the statements are insufficient because they contain averments that Plaintiff "believes" to be true. Therefore, for the purposes of this motion, the Court will not consider the statements in which Mrs. Metayer states only a "belief". I recommend that the Court STRIKE those statements as indicated below:

A2. My family had two health insurance policies from the State Farm Mutual Automobile Insurance Company since well prior to 1990. We made application with William Fox for health insurance through PFL and/or NASE in February of 1994 ~~and I believe that the PFL health insurance was effected in February or March of 1994.~~ In the early part of 1996, ~~I believe January of 1996,~~ we cancelled the PFL policy. We then obtained health insurance through John Alden Life Insurance Co., Group Number 924629-000 1 (Metayer Foundations, Inc.). Subsequently in January or February of 1998, the John Alden policy was canceled and we obtained health insurance from Tufts.

I am not sure of the effective dates of each policy and annual premiums for each policy. However, I understand that we will make available the documents in my possession relative to all health insurance policies from 1990 to the present.

A3. There were two occasions when William Fox made a sales presentation at our home. ~~I believe the first such visit occurred in the fall or early winter of 1994.~~ It occurred when we were living on the Running Springs Road in Gorham. At that meeting William Fox and I were present.

It is impossible for me to recall verbatim everything that was said at that meeting several years ago. We discussed the current medical insurance that my family had through State Farm. Mr. Fox indicated that he understood my husband was a contractor and he stated that the PFL policy was a superior health insurance policy especially with respect to self-employed contractors because he felt that self-employed people in the construction industry seldom get sick but often have accidental injuries. He indicated that this was a particularly good policy because it covered one hundred percent of all expenses related to any accidental injury.

~~It is my belief that various rates may have been discussed with respect to different levels of coverage.~~ My lawyer advises me that notes taken at this meeting will be made available in response to Defendant's request for production. I also recall that Mr. Fox stated that the policy was guaranteed to cover pre-existing condition. ~~Although I am not certain, I believe that he reviewed a copy of our then current State Farm policy.~~ I know that I gave him some background information as to my husband's occupation and our family. I don't recall the specifics of the information that I gave to him. I do recall that he showed me some pamphlets or booklets that explained NASE and benefits attributable to being a member of NASE.

The second meeting was in early 1994. While I don't have a specific memory of the date, I note that I wrote a check to Mr. Fox on February 15, 1994. ~~I~~

~~believe this check covered the NASE membership fee and an initial payment to PFL for the health insurance.~~ At this second meeting, myself, my husband and our four employees, Oren White, Todd Wing, Devereaux Barnes and Rick Jordan were present.

~~I believe at this meeting Mr. Fox asked a series of questions concerning my family, their ages, health, etc.~~ We filled out certain paperwork. ~~I believe that he filled out an application which I and my husband signed at that meeting.~~ At this meeting our State Farm health insurance policy was discussed as was the cost of the insurance. I was repeatedly assured by Mr. Fox that this coverage was much better than that which was provided by the State Farm policy, particularly with respect to accidental injuries (it covered 100% of all expenses related to an accidental injury) and because it was available through PFL at a better price.

I also recall a discussion at the second meeting about a prescription drug plan through NASE.

I recall one or perhaps two of the employees, although I am not sure which ones, inquiring as to the accidental injury coverage. My recollection is that Mr. Fox indicated that he had suffered a serious knee or leg injury skiing, requiring substantial treatment and that the PFL policy covered all expenses related thereto.

A7. I am not sure on what date I received the PFL health insurance policy. ~~I believe it was received by regular mail, but I am not certain of this.~~ I am certain that I reviewed the policy within a reasonable amount of time after receipt. I cannot state that I read and understood each word verbatim. Like all insurance policies that I have reviewed, I found the entire policy to be somewhat confusing and difficult to understand. I am not a lawyer. I relied on Mr. Fox's description of the policy and I do not recall making any further inquiries of PFL or Fox or NASE.

C. David Saucier's Affidavit

Defendants next ask the Court to strike the affidavit of David Saucier, a former employee at PFL, because the statements in his affidavit are irrelevant, lack a proper foundation and contain hearsay. In the affidavit, Saucier states that he was under contract with UGA to act as a health insurance agent for PFL. Saucier

then makes a series of statements based on his employment as a health insurance agent for PFL. The Court is satisfied that, for purposes of this motion, the affidavit indicates a sufficient foundation for Saucier to state what he saw and experienced while employed at PFL. The Court is also satisfied that the affidavit is relevant to the Plaintiffs' suit, especially with regard to Plaintiffs' claim that Defendants negligently hired and trained its agents. For the reasons stated, I recommend that the Court not strike Saucier's affidavit.

D. Elizabeth Metayer's Affidavit

Defendants ask the Court to strike the exhibits attached to Elizabeth Metayer's affidavit. Defendants contend that the exhibits, Plaintiffs' hospital bills, must be sworn to or must be certified copies in order to be considered by the Court on a motion for summary judgment. F. R. Civ. P. 56(e) ("Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.") Because the attached exhibits do not fulfill the requirements of the Rule, I recommend that the exhibits be STRICKEN.

Summary Judgment

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

However, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

Factual Background

With the law cited above in mind, the Court recites the following facts in a light most favorable to the nonmovants, i.e., Plaintiffs. In late 1993, Elizabeth Metayer responded by telephone to an advertisement for health insurance that appeared in a National Association of Self-Employed ("NASE") publication. Mrs. Metayer was interested in the advertisement because she believed her premiums

with State Farm were "going sky high." E. Metayer Depo. at 20. She also wanted to determine what type of health insurance coverage her employees at Metayer Foundations, Inc., a construction company owned by Plaintiffs, could obtain. William Fox ("Fox"), a health insurance agent for PFL and UGA, returned Elizabeth Metayer's call and they met in the fall of 1993.[2]

At the first meeting between Elizabeth Metayer and Fox, Fox presented her with a NASE-endorsed PFL health insurance plan called the "Small Business Basic Plan" - the GHP 7 policy. Fox brought with him a notebook on the policy that described what the policy covered. During the meeting, Metayer and Fox compared the existing deductible and premium amounts in the GHP 7 policy with Metayer's State Farm policy. Elizabeth Metayer and Fox also discussed the policy's coverage of existing conditions and coverage of Plaintiffs' employees, (should the employees choose to apply for the policy), and generally compared the coverage under the GHP 7 policy with the coverage under the State Farm policy. During this meeting Fox told Mrs. Metayer that the GHP 7 policy covered 100 percent of the medical bills related to accidental injuries and that the GHP 7 policy

[2] Technically, William Fox had a contract with NASE Field Services Agency (NFSA). UGA does business under that name. Fox was under contract with NFSA to solicit insurance applications for UGA. PFL maintained an agreement with UGA in which UGA sold PFL policies. SMP ¶6.

was superior to Plaintiffs' existing policy.

The facts in the record present conflicting accounts as to whether Mrs. Metayer decided to purchase the GHP 7 policy prior to her second meeting with Fox on February 15, 1994. In any event a second meeting was held at which Mrs. Metayer was accompanied by Mr. Metayer and four of their employees. Fox presented the GHP 7 policy to the Metayers and the employees. At the meeting Fox again represented that the Plan covered 100 percent of the medical costs stemming from accidental injuries. Mrs. Metayer asserts she overheard Fox telling the employees that he had suffered a knee injury while skiing and that the policy had covered all the costs related to his injury.

The Metayers decided to purchase the policy and filled out an application. Mrs. Metayer did not read the application until after she signed it. In the top right hand corner of the page preceding Plaintiffs' signature, the figure of "$600" is written next to the line entitled "Accidental Benefit."

At the second meeting, both Plaintiffs also separately signed identical documents entitled "Confirmation of Presentation and Acknowledgment of Delivery." By signing this document Plaintiffs acknowledged that they reviewed the Outline of Coverage also known as the "Small Basic Business Plan". On page thirteen of the Outline of Coverage is an "Outpatient Accidental Expense Benefit

Rider" which is circled with the notation "included". The last line of the Rider reads "Your choice of maximum benefit payable under this option is: □ $600 □$1200." Although Fox routinely checks off one of the boxes in the Rider, neither box was checked off.

By signing the "Confirmation of Presentation and Acknowledgment of Delivery" Plaintiffs also acknowledged that they would not receive coverage until their application was approved by Defendants. Furthermore, the Acknowledgment of Delivery gave Plaintiffs ten days to review the Plan and cancel their coverage. However, Mrs. Metayer did not review the policy until several weeks after she purchased it. Even after she reviewed the policy, she found the description of the policy confusing and continued to believe that the Plan covered 100 percent of medical costs related to accidental injuries.

In the fall of 1995, Mr. Metayer suffered a serious injury at work and as a result spent several months in the hospital. He incurred considerable medical bills from various medical providers including Maine Medical Center. PFL agreed to pay approximately $85,000 of the $465,000 of bills incurred. As a result of Defendants' refusal to pay the remaining portion of the bills, Mr. Metayer became distressed and spent approximately one week in Maine Medical Center's psychiatric unit.

Facts relevant to Plaintiffs' claim of negligent hiring and training

Defendants hired agents without regard to their educational background or training in the insurance industry. PFL trained its agents, in groups of three to four, by going over the Outline of Coverage page by page and by going over applications, pricing and other paperwork needed to process the application. Training agents to understand the substance of the Outline of Coverage normally took half a day. Training in the other areas typically took three to five days. PFL did not train its agents on what was legal and illegal when selling health insurance. PFL encouraged its agents to relate their own experiences with injuries and health coverage. In accordance with that suggestion, Fox sometimes mentioned his knee injury and the coverage he received to prospective customers. Although Fox stated that 100 percent of his medical expenses from his knee injury were covered, some of those expenses in fact were not covered.

An agent trained by PFL avers that PFL agents were trained to represent that PFL's policy covered 100 percent of the medical costs attributed to accidental injury. The same affiant also states that agents were trained to spend little time discussing policy coverage and were told to focus on comparing the deductibles and premiums available of the PFL policy to the prospective customers existing policy.

Legal Analysis

A. Justifiable Reliance

Defendants argue that it is entitled to summary judgment on all Counts because based on the facts in the record Plaintiffs could not have, as a matter of law, justifiably relied on Fox's statements. The misrepresentations alleged are:

(1) Fox said that the policy covered 100 percent of medical expenses that arose out of an accidental injury;

(2) Fox said that he had earlier been injured in a skiing accident and that the policy covered all his expenses when, in fact, not all of his injuries were covered under the policy;

(3) Fox generally compared the two policies, and stated that the PFL policy was superior to the State Farm policy.

Defendants argue that even assuming that Fox made these statements, Plaintiffs could not have reasonably relied on those statements because:

(1) the Outline of Coverage indicated that the maximum benefit available under the Outpatient Accidental Expense Benefit is $600 or $1200;

(2) the application signed by Plaintiffs indicated the Accidental Benefit amount as $600.

Defendants maintain that because the written materials signed and reviewed by

Plaintiffs clearly indicate a limitation on the accidental coverage, Plaintiffs could not, as a matter of law, have justifiably relied on Fox's misrepresentations.

In *Ferrel v. Cox*, 617 A.2d 1003, 1006 (Me. 1992), the Law Court addressed whether a claim for fraud is precluded where alleged oral misrepresentations contradict a signed agreement.

> Maine precedent is clear. A signed agreement that contradicts prior oral statements does not bar an action for fraud as a matter of law. . . A plaintiff's reliance on the fraudulent misrepresentations of a defendant *is unjustified only if the plaintiff knows the representation is false or its falsity is obvious to the plaintiff.*

Id. (citation omitted) (italics added).

Defendants do not contend that Plaintiffs knew that the misrepresentations were false. Instead, as stated above, Defendants assert that the falsity of Fox's statements was obvious to Plaintiffs. The Court is satisfied that questions of fact exist as to whether the falsity of Fox's statements was obvious to Plaintiffs. The Court arrives at this conclusion for the following reasons:

1. Fox repeatedly stated that the PFL policy covered 100 percent of medical costs related to accidental injuries;

2. Fox related a story that a ski injury he suffered was completely covered by the policy when, in fact, the policy did not cover all his medical costs related to the injury;

3. Although it appears that Fox went over the Accidental Coverage in the Outline of Coverage, it is not at all clear in what detail he did so. In fact, although Fox normally checks one of the boxes that indicates whether the applicant chose $600 or $1200 benefit, neither box was checked;

4. Although the upper left hand corner of the application indicates that Plaintiffs chose $600 of accidental coverage, this notation is not in Plaintiffs' handwriting nor is it initialed by either of the Plaintiffs. Further, Plaintiffs do not recall discussing such a limitation, nor is the limitation set out in a manner as to make it obvious to the applicants that they were choosing that coverage.

For the reasons stated above, I am satisfied that questions of fact remain as to whether Plaintiffs justifiably relied on Fox's statements regarding the coverage under the policy and therefore recommend that Defendants' motion be DENIED.

B. Defendants' claim that Plaintiffs' Recovery pursuant to their Misrepresentation Claims is Limited Because Maine Medical Center Failed to File a Counterclaim Against Plaintiffs

In addition to this action against PFL and UGA, Plaintiffs have brought a separate medical malpractice action against Maine Medical Center in the state superior court relating to its treatment of Mr. Metayer after his accident. *Metayer v. Maine Medical Center*, CV 97-188 (Cumb. Cty.). That action is scheduled for

trial this fall.

Defendants argue that because Maine Medical Center ("MMC") has not asserted a counterclaim for unpaid bills against Plaintiffs in the state action, Plaintiffs cannot recover medical expenses owed to MMC from Defendants. Defendants first point out that intentional and negligent misrepresentation are claims in which the claimant is entitled only to pecuniary loss. The Court agrees. *See Jourdain v. Dineen*, 527 A.2d 1304, 1307 (Me. 1987) (claims of intentional misrepresentation are limited to pecuniary loss); *Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990) (adopting Restatement which limits recovery for negligent misrepresentation to pecuniary loss.)

Defendants next argue that because the pecuniary damages alleged by Plaintiffs relate, in large part, to the medical bills owed by Plaintiffs to MMC, Plaintiffs cannot be awarded those damages because MMC waived any claim to the bills by failing to file a counterclaim in the state action pursuant to M.R. Civ. P. 13(a).[3] While Defendants may ultimately be correct, the Court cannot at this

[3] Rule 13(a) provides:

> a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim, and does not require for its adjudication the presence of third-parties of whom the court cannot acquire jurisdiction.

time conclude that MMC waived its claim to those medical bills.

Although M. R. Civ. P. 13(a) requires a party to file a claim that arises out of the "same transaction or occurrence that is the subject matter of the claim" it is by no means clear that MMC has waived its opportunity to assert a counterclaim against Plaintiffs. Defendants have not pointed this Court to any time limitation within the Rule that would require the Court to conclude that MMC has waived its opportunity to assert a counterclaim. In fact, M. R. Civ. P. 15(a) states that leave to amend a pleading, "shall be freely given when justice so requires." This Court cannot conclude, as a matter of law, that the state court would prevent MMC from filing a counterclaim concerning Plaintiffs' unpaid medical bills. For the reasons explained above, I recommend that Defendants' Motion for Summary Judgment on this count be DENIED.[4]

C. Plaintiffs' Innocent Misrepresentation Claim

Plaintiffs assert a claim against Defendants for innocent misrepresentation as set forth in the Restatement (Second) of Torts §552C. Maine has never adopted innocent misrepresentation as a cause of action and the Law Court has explicitly

[4] Defendants' Motion to Stay this matter is also before the Court. (Docket No. 28). This Court will act on the motion subsequent to the District Court's action on this Recommended Decision. Of course, if the District Court disagrees with this Court's recommendation and grants the Motion for Summary Judgment, the Motion to Stay becomes moot.

refused to consider whether such an action is recognized in Maine. *Emerson v. Ham*, 411 A.2d 687, 690 (Me. 1980). Therefore, this Court must predict what the Law Court would do in this instance.

A review of cases decided by the Law Court since *Emerson* leave this Court with almost no direction on whether the Law Court would adopt innocent misrepresentation as a right of action. Plaintiffs cite *Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990) for the proposition that the Law Court would allow a claim of innocent misrepresentation to proceed before a jury. In *Chapman*, the Law Court adopted the Restatement formulation of negligent misrepresentation. Restatement (Second) of Torts §552(1) (1977). The Law Court stated, "[w]e adopt the Restatement formulation as it applies to this case. Although scienter is traditionally required, we are persuaded that the Restatement reflects a well-reasoned exception to that requirement." *Chapman*, 568 A.2d at 830. However, the fact that the Law Court allowed one exception to the scienter requirement does not mean it will allow another. If the Law Court were to adopt innocent misrepresentation as a legal remedy in Maine, it would be no small step. As the Court stated in *Emerson*, innocent misrepresentation "would . . . impose strict liability on a seller for her alleged misrepresentation." *Emerson*, 411 A.2d at 690. In the absence of stronger signals from the Law Court, the Court cannot find that

the Law Court would adopt the tort of innocent misrepresentation as set out in the Restatement. For this reason above, I recommend that Defendants' Motion for Summary Judgment be GRANTED as to Plaintiffs' innocent misrepresentation claim.

D. Intentional Infliction of Emotional Distress

Defendants maintain that the facts alleged by Plaintiffs do not support their claim for emotional distress. To support a claim for intentional infliction of emotional distress, Plaintiffs must establish that:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct;
>
> (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community;
>
> (3) the actions of the defendant caused the plaintiff's emotional distress; and
>
> (4) the emotional distress suffered by the plaintiff was so severe that no reasonable man could be expected to endure it.

Maine Mut. Fire Ins. Co. v. Gervais, 715 A.2d 938, 940 (Me. 1998) (citing *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148,154 (Me.1979)).

The Court is satisfied that the record contains no averments by Plaintiffs that Mrs. Metayer suffered emotional distress. For that reason, the Court recommends that

Defendants' motion as to Mrs. Metayer be GRANTED.

Mr. Metayer, however, claims that his one week stay at the psychiatric unit at MMC was caused, at least in part, by Defendants' refusal to pay his medical bills. Defendants contend the Plaintiffs have failed to allege facts from which a reasonable jury could conclude that Fox, Defendants' agent, acted in an extreme and outrageous manner, exceeding the bounds of all possible decency, that no reasonable person could endure.[5] In Maine:

> [i]t is for the Court to determine, in the first instance whether the Defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery, or whether it is necessarily so. Where reasonable [people] may differ, it is for the jury, subject to the control of the Court to determine whether, in a particular case the conduct has been sufficiently extreme and outrageous to result in liability.

Colford v. Chubb Life Insurance Co., 687 A.2d 609, 616 (Me. 1996) (quoting *Rubin v. Matthews Int'l Corp.*, 503 A.2d 694,699 (Me. 1986)).

Plaintiffs maintain that Fox's misrepresentations and Defendants' negligence in training its agents were sufficiently outrageous to require submission this claim to the jury. The Court agrees. The Court arrives at this conclusion based on the alleged conduct of the Defendants beyond any misrepresentations allegedly made

[5] The Court rejects Defendants' assertion that Mrs. Metayer was the only person to whom the alleged misrepresentations were made. It is undisputed that Mr. Metayer was present at the second meeting at which the misrepresentations were allegedly made.

by Fox. *See Massengale v. Ogu*, No. 91-489-LFO, 1992 WL 25894 at *1 (D.D.C. Jan. 28, 1992) ("fraud alone is not enough to state [such] a claim [of intentional infliction of emotional distress] . . . Such a claim must include some outrageous act . . . ."). Plaintiffs have presented evidence that Defendants trained their agents to represent to customers that the policy covered 100 percent of the medical costs related to accidental injuries, even though that representation was false, and trained their agents to spend as little time as possible explaining the scope of coverage provided by the plan. If it is proved at trial that this training led to the alleged misrepresentations, the Court is satisfied that a reasonable jury could find that such training constituted extreme and outrageous conduct. For the reasons stated above, I recommend that Defendants' motion on this ground be DENIED as to Mr. Metayer and GRANTED as to Mrs. Metayer.

E. Negligence

Plaintiffs claim that Defendants, through their agent, breached their duty to use due care in explaining the policy coverage and to provide insurance as represented by Fox. Defendants counter that Fox was solely a soliciting agent for them and as such, did not owe the duties Plaintiffs' claim they are owed. Maine law is clear that when an agency relationship does not exist between the agent and the insured, the agent does not have a duty to advise the insured as to the adequacy

of the coverage. *Ghiz v. Richard S. Bradford*, Inc., 573 F.2d 379, 380-81 (Me. 1990). An insurance agent only undertakes a duty to adequately explain the coverage in the plan when the agent procures insurance for another. *Roberts. v. Maine Bonding & Cas. Co.*, 404 A.2d 238 (Me. 1979).

Here, Fox never undertook a duty to procure for Plaintiffs insurance that would cover 100 percent of accidental injury expenses. Fox presented himself as an agent for Defendants and offered to sell Plaintiffs one plan. He never agreed to act as Plaintiffs' agent and find a plan to meet their needs. For these reasons, Defendants cannot be liable under the legal theory advanced by Plaintiffs.

In their Amended Complaint filed just before Defendants' Motion for Summary Judgment, Plaintiffs assert, within the negligence count, that Defendants negligently hired and trained their agents, including Fox. Defendants suggest that Plaintiffs have not asserted facts indicating that such negligence caused harm to Plaintiffs. While Defendants ultimately may be correct, the Court is satisfied that based on the facts in the record a trier of fact could conclude that : (1) Fox made misrepresentations concerning the policy's scope of coverage; and (2) those misrepresentations were caused by Defendants' failure to properly train Fox. *See infra* pp.12-13. I recommend that Defendants' motion on this count be GRANTED to the extent Plaintiffs' claim is based on the alleged

misrepresentations and DENIED to the extent Plaintiffs' claim is based on the negligent hiring and training of Fox.

F. Negligent infliction of Emotional Distress

Plaintiffs next assert a claim of negligent infliction of emotional distress. To establish such a claim Plaintiffs must demonstrate that: (1) Defendants were negligent; (2) it was reasonably foreseeable that the negligent conduct would cause emotional distress; and (3) Plaintiffs in fact suffered severe emotional distress. *Krennerich v. Town of Bristol*, 943 F. Supp. 1345, 1357 (D. Me. 1996) (citing *Bolton v. Caine*, 584 A.2d 615, 617-18 (Me.1990)).

As discussed above, Mrs. Metayer has failed to allege any facts that she suffered emotional distress. Therefore I recommend that Defendants' motion as to Mrs. Metayer be GRANTED.

Defendants argue that because Mr. Metayer's claims are similar to a breach of contract action, he cannot now recover for negligent infliction of emotional distress absent a showing of some physical injury arising from Defendants' tortuous conduct. *See McAfee v. Wright*, 651 A.2d 371 (Me. 1994); *Marquis v. Farm Family Mutual Insurance Co.*, 628 A.2d 644, 651 (Me. 1993). While it is true that Mr. Metayer does not allege a physical injury, he does, as stated above, allege an independent underlying negligence claim against Defendants. In Maine,

" [a] contention [of] mental distress is insufficient in and of itself to establish the harm necessary to make negligence actionable, without either accompanying physical consequences, *or an independent underlying tort.*" *Rubin v. Matthews Intern. Corp.*, 503 A.2d 694 (Me. 1986) (italics added). Having alleged an independent underlying tort, negligence, no physical injury need be alleged by Mr. Metayer. Accordingly, I recommend that Defendants' motion on this claim be DENIED as to Mr. Metayer and GRANTED as to Mrs. Metayer.[6]

G. Contract claim

Plaintiffs next claim that Defendants, through their agent, breached a contract between them and Plaintiffs by failing to provide 100 percent coverage for accidental costs. The Court disagrees. Based on the facts in the record, it is clear that Fox, Defendants' agent, never contracted to provide 100 percent coverage to the Plaintiffs. As Defendants correctly note, the cases cited by Plaintiffs for the proposition that an insurance agent may be contractually bound to the oral declarations made to a customer are cases in which the broker explicitly agreed to procure a particular type of coverage requested by the customer. *Bramson v. Chester L. Jordan & Co.*, 379 A.2d 730,732 (Me. 1977); *Miller v.*

[6] Because Defendants did not discuss whether the emotional distress suffered by Mr. Metayer was reasonably foreseeable from the negligence alleged, the Court does not address that issue in this decision.

Liberty Ins. Co., 213 A.2d 831 (Me. 1965). Here, Fox only agreed to sell the one PFL policy offered and never agreed to procure a particular type of coverage for the Plaintiffs.

Furthermore, Fox only agreed to submit the insurance application to the company, which under the general principles of insurance law constitutes an offer by the prospective customer to the insurance company. *Couch on Insurance*, 3d §11.1 ("A blank application is generally not regarded as an offer, but as a proposal from the insurer to make a contract of insurance. When the applicant completes the application and returns it to the insurer, it becomes an offer for an insurance contract.") The type of misrepresentations allegedly made by Fox are insufficient to constitute an offer triggering formation of a contract. Accordingly, I recommend that Defendants' motion on this count be GRANTED.

H. Maine's Deceptive Trade Practices Act

In their Complaint, Plaintiffs assert a claim against Defendants under the Deceptive Trade Practices Act, Me. Rev. Stat. Ann. tit. 10, §§ 1211-1216. At an oral hearing on Defendants' Motion for Summary Judgment, Plaintiffs agreed to withdraw this claim.

I. Unfair Trade Practices Act

Plaintiffs next argue that Defendants, through their agent, violated the

Unfair Trade Practices Act ("UTPA"), Me. Rev. Stat. Ann. tit. 5, §§ 205-214. Plaintiffs allege that Defendants' conduct "constitutes unfair methods of competition and unfair and deceptive acts or practices in the conduct of trade or commerce." Plaintiffs' Complaint at ¶ 63. Defendants counter that the UTPA exempts from its scope those industries already regulated by Maine or the United States. Specifically, "[t]ransactions or actions otherwise permitted under laws as administered by any regulatory board or officer under statutory authority from the state or of the United States . . . " are exempt from UTPA. 5 Me. Rev. Stat. Ann. tit. 5, §208(1). In accordance with the plain language of the section, the Law Court refused to allow a defendant to file a counterclaim under UTPA because the plaintiffs were licensed real estate brokers subject to the regulatory authority of the Maine Real Estate Commission. *See First of Maine Commodities v. Dube,* 534 A.2d 1298, 1301 (Me. 1987); *see also Wyman v. Prime Discount Sec.*, 819 F. Supp. 79, 86-87 (D. Me. 1993) (finding that Law Court would not permit UTPA claim against defendant because sale of securities is already regulated by federal and state governments.)

Plaintiffs respond by citing *Binette v. Dyer Library Assoc.*, 688 A.2d 898 (Me. 1996). In *Binette,* the Law Court allowed the plaintiff to assert a UTPA claim against a real estate agent. Plaintiffs maintain that because the Law Court

allowed the UTPA claim to go forward, it effectively overruled the decisions in *Dube* and *Wyman*. The Court disagrees and refuses to interpret *Binette* so broadly. Nowhere in *Binette* does the Law Court even mention the exemption provision cited by Defendants and discussed in *Dube* and *Wyman*. In fact, it appears that the defendant in *Binette* did not even raise that issue with the court. Therefore, the Court is satisfied that the proposition laid down in *Dube* and *Wyman* stands.

There is no dispute in this case that insurance is an industry regulated by the Maine Bureau of Insurance. The Bureau may impose a variety of penalties on Defendants if it determines they engaged in unfair or deceptive trade practices. For the reasons stated above, I am satisfied that the exemption under section 208(1) applies and recommend that Defendants' motion be GRANTED on this Count.

J. Unfair Claims Practices

Plaintiffs next seek damages pursuant to Me. Rev. Stat. Ann. tit. 24-A, § 2436-A. Plaintiffs argue that Defendants, through their agent, violated the statute by knowingly misrepresenting to Plaintiffs what the policy covered. The statute provides:

> 1. Civil actions. A person injured by any of the following actions taken by that person's own insurer may bring a civil action and recover damages, together with costs and disbursements, reasonable attorney's fees and interest on damages at the

rate of 1 ½ percent per month;

> A. Knowingly misrepresenting to an insured pertinent facts or policy provisions to coverage at issue . . . .

Id.

Neither party cites any cases to support its position and the Court has found none on point. Therefore, the Court will look to the plain language of the statute. *Foster v. State Tax Assessor*, 716 A.2d 1012, 1014 (Me. 1998). ("In the interpretation of a statute, we seek to effectuate the intent of the Legislature, which is ordinarily gleaned from the plain language of the statute.")

There is no question that a claim exists under the statue when one's insurance company knowingly misrepresents to the insured the coverage to which the insured is entitled. Here, the key issue is whether the legislature intended to cover misrepresentations made by an insurance company *before* one is insured. Upon reviewing the statute the Court is satisfied that the statute was not intended to cover an agent's misrepresentation to a customer before the customer becomes insured. The language of the statute gives a person a cause of action if his "own insurer" knowingly misrepresents the "coverage at issue." At the time the alleged misrepresentations were made, Defendants were not Plaintiffs' "own insurer." For the reasons stated above, I recommend that Defendants' motion as to this count be

GRANTED.

K. Punitive Damages

Lastly, the Court must determine whether, based on the evidence in the record, punitive damages are available to Plaintiffs as a matter of law. To recover punitive damages, Plaintiffs must demonstrate by clear and convincing evidence that Defendants acted with malice. In Maine

> [T]he requirement of malice will be most obviously satisfied by a showing of "express" or "actual" malice. Such malice exists where the defendant's tortuous conduct is motivated by ill will toward the plaintiff. Punitive damages will also be available, however, where deliberate conduct by the defendant, although motivated by something other than ill will in any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied. We emphasize that, for the purposes of assessing punitive damages, such "legal" or "implied" malice will *not* be established by the defendant's mere reckless disregard of the circumstances.

Tuttle v. Raymond, 494 A.2d 1353, 1361 (Me. 1985). (citations omitted). The Court is satisfied that Plaintiffs have not asserted facts from which a trier of fact could find that actual malice existed. Therefore, the Court must determine whether Defendants' actions, through its agent and on their own part, were so outrageous that malice may be implied. Plaintiffs argue, and the Court agrees, that the following evidence would allow a trier of fact to impose punitive damages on Defendants: (1) PFL trained its agents to represent that the PFL policy covered

100 percent of medical expenses related to accidental injuries when in fact it did not; (2) PFL trained its agents to spend minimal time reviewing the coverage the policy provided; (3) Agent Fox, on more than one occasion, falsely represented to Plaintiffs that the PFL policy covered 100 percent of medical costs related to accidental injuries. The Court is satisfied that based on these facts, a trier of fact could find implied malice and impose punitive damages against Defendants. Accordingly, I recommend that Defendants' motion as to this count be DENIED.

L. ERISA Preemption

Defendants also argue that ERISA preempts Plaintiffs' claims. Recently, this Court held that a misrepresentation that occurs prior to the insurance policy's effective date is not covered by ERISA. *See Stetson v. PFL Insurance Co.*, 16 F. Supp. 2d. 28 (D. Me. 1998). Pursuant to the Court's reasoning in *Stetson*, Plaintiffs' claims are not preempted by ERISA.

Conclusion

For the reasons delineated above, I recommend that Defendants' Motion to Strike be GRANTED in part and DENIED in part and that Plaintiffs' Motion to Strike be DENIED. Further, I recommend that Defendants' Motion for Summary Judgment be GRANTED as to Counts II, V, VI, VII, and VIII and DENIED as to Counts I, III, IV, XI, X and XII. Defendants' motion as to Counts IX, X and XI is

GRANTED in part and DENIED in part.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____

Eugene W. Beaulieu
United States Magistrate Judge

Dated on July 15, 1999.